sodali ALIGNING INTERESTS

August 17, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via email – rule-comments@sec.gov

Re: File Number S7-10-09, Facilitating Shareholder Director Nominations.

Dear Ms. Murphy:

I am writing to express support for the Securities and Exchange Commission's proposal to facilitate shareholder director nominations ("shareholder access") by the adoption of Rule 14a-11 and amendment of Rule 14a-8 under the Securities and Exchange Act of 1934.

I am writing on behalf of Sodali, a global corporate governance consultancy and service provider to listed companies in continental Europe, Latin America and developing markets (www.sodali.com). Sodali, with offices and representatives in major financial centers around the world, is a member of the Global Wealth Management Group (www.gwmholding.com). Sodali's mission is to align the interests of companies and investors, thereby helping clients improve relations with shareholders, reduce risk and lower their cost of capital. With this mission in mind, we have considered the Commission's proposal carefully from both corporate and investor perspectives.

My personal views with respect to the implementation of shareholder access have been set forth in an article, "A 'Common Sense' Approach to Shareholder Access -- A Modest Proposal for an Access Bylaw," that appeared in *the Corporate Governance advisor*, Volume 16, Number 4, July/August 2008. A copy of that article is available at www.sodali.com.

When the Commission proposed an earlier version of Rule 14a-11 in 2003, I submitted comments in support of the proposal's goals but expressed reservations about the practical problems that would arise from its implementation. Although there have been only modest improvements in the workings of the U.S. proxy system in the intervening six years, statements made recently by SEC Chairman Mary Schapiro in speeches to the Council of Institutional Investors and to the International Corporate Governance Network confirm that the Commission intends to conduct a thorough review of the U.S. proxy system. In light of this pending review, this letter does not discuss proxy voting mechanics.

Two basic concerns arise in connection with the proposal: (1) Is Rule 14a-11 sufficiently deferential to "the traditional role of the states in regulating corporate governance?" (Release, p. 8); and (2) Does the proposal achieve the Commission's goal of "removing burdens that the federal proxy process currently places on the ability of shareholders to exercise their basic rights to nominate and elect directors?" (p. 13) For the reasons set forth in this letter we believe that the Commission has addressed both these concerns and that the proposal merits the support of both companies and shareholders.

Access is a right, not a penalty

Proposed Rule 14a-11 differs from the Commission's 2003 proposal in a fundamentally important way: it does not require triggering events. Although this difference has been the subject of little commentary, it is a matter of principle that is critically important to the validity of Rule 14a-11. With the elimination of any requirement for triggering events, the Commission has made clear that shareholder access is not designed to function as a regulatory penalty for underperforming or poorly governed companies. Instead, the function of Rule 14a-11 is to define access as a fundamental shareholder right rooted in state law and to protect this right through the establishment of a federal default standard.

The distinction between penalizing companies and protecting shareholder rights is not a matter of theory or semantics – it informs both the meaning and import of Rule 14a-11 as well as the Commission's authority to adopt it.

Balancing state and federal law

We believe that Rule 14a-11 in combination with the amendments to Rule 14a-8 strikes an appropriate balance between federal and state law. The proposal establishes a federal standard while leaving room for the states and shareholders to develop different formulations for access, provided they do not violate the minimum federal criteria.

Establishing a federal standard for access is not equivalent to imposing "a single rule" on all companies, or "prohibiting" shareholders from exercising their state law rights, or "preempting" state law, or eliminating "private ordering" from the implementation of shareholder access. Indeed, the proposal's deference to "states that prohibit nominations of directors by shareholders or permit companies to prohibit such nominations" (p. 181) is not an empty gesture. The fact that no state is known to have such a prohibition indicates widespread acceptance by the states of shareholders' right to nominate and elect directors. The additional fact that to our knowledge no state other than North Dakota had enacted a statutory access provision until Delaware's recent adoption of new Section 112 further underscores the need for Rule 14a-11. The existence of a state law right without defining characteristics or means of implementation is of no practical use to shareholders.

Both the terms of Rule 14a-11 and the amendments to Rule 14a-8 make clear that the Commission expects and encourages shareholders to decide for themselves when to make use of access, which companies to target and how to use access most effectively as an engagement tool. This approach permits access campaigns to be tailored to the circumstances of individual companies and to the economic priorities of shareholders.

Costs and uncertainties

Many commentators have expressed concern about the potential costs and uncertainties that may arise from implementation of Rule 14a-11. These include: time demands on corporate boards; the impact of shareholder-nominated directors on board collegiality and strategic focus; procedural demands on board nominating and governance committees; the additional cost of professional advisors and service providers; increased director liability; new costs related to proxy disclosures and voting mechanics; uncertainty about procedures for record-keeping, communication, voting and tabulation; design and function of a "universal proxy"; changes in processes administered by brokers, banks, custodians and intermediaries; generalized worry about interpretive issues, "unintended consequences" and policy differences that accompany every regulatory reform.

These costs and uncertainties are legitimate concerns, but they do not arise solely because of Rule 14a-11. The implementation of shareholder access -- whether by means of Rule 14a-11, by state law, by charter or by-law amendments, by shareholder proposals, by negotiated or voluntary corporate action, or by any other means -- will raise the same issues. Many of these issues are best resolved by private ordering. We agree with the Commission's statement, "As is the case with regard to the Rule 14a-8 staff no-action process, we encourage companies and shareholders to attempt to resolve disputes independently." (note 223, p. 101.)

To the extent that these issues cannot be resolved by private ordering, we believe that the Commission's pending review of the U.S. proxy system will provide an appropriate forum. In addition, over the long term Rule 14a-11 will have the effect of stimulating the "evolutionary process" by which state legislatures, state and federal courts and self-regulatory organizations will further refine and interpret access within their jurisdictions.

Educating the investing public

A scientific survey of 1,256 U.S. investors was conducted recently by Opinion Research for the Shareowner Education Network (www.ShareOwners.org), a non-profit organization whose mission is to develop and educate a network of citizen investors, inform them about their rights as shareholders and facilitate their share voting and engagement with corporations for the purpose of reducing risk and creating sustainable long-term value. The survey found that American investors support prompt and tough action by Congress and regulators to reform our financial markets and clean up abuses on Wall Street. Support for such action is strong across all groups by age, income, educational achievement and political affiliation. It is particularly noteworthy that a high percentage of investors (34 percent) choose the term "angry" to describe their attitude with respect to financial market problems and the need for prompt action. In addition, nearly half of other investors (45 percent), even though they do not describe themselves as angry, want to see strong action taken. These results send an unmistakable message to regulators and policy makers, particularly in the context of the survey's finding that nearly six out of 10 investors (57 percent) said that strong federal action would help to "restore their lost confidence in the fairness of the markets."

The full survey is available on the ShareOwners.org web site. The following findings are particularly relevant to proposed Rule 14a-11 and underscore the need for education of the investing public about shareholder access:

- More than four out of five American investors (82 percent) agree that "shareholders should have the ability to nominate and elect directors of their own choosing to the boards of the companies they own." Only 16 percent say that "shareholders should NOT be able to propose directors to sit on the boards of the companies they own."

- More than four out of five investors (83 percent) agree that "shareholders should be permitted to be actively involved in CEO pay and other important issues that may bear on the long-term value of a company to their retirement portfolio or other fund."

- More than four out of five investors (81 percent) say the No. 1 reason for loss of investor confidence in the markets is "overpaid CEOs and/or unresponsive management and boards."

In light of these findings, we believe that implementation of Rule 14a-11 should include a coordinated effort to educate shareholders about their rights and build greater confidence in the effectiveness of board nomination and election, share voting and shareholder engagement. Adoption of Rule 14a-11 will increase the need for an educated and informed electorate.

Eligibility and disclosure requirements

With one exception, we generally support the eligibility and disclosure requirements of Rule 14a-11. We believe the Commission has made a convincing case in support of its decisions even though some criteria may appear arbitrary and arguments can be made for different approaches. The resulting framework is reasonable and leaves room for private negotiation and use of the no-action process to resolve interpretive issues.

We do not support proposed Rule 14a-11(d)(3) that takes a first-come, first-served approach to the selection of nominees in cases where there are multiple sponsors of different candidates. We believe that when there are competing shareholder nominees the largest shareholder or group sponsor, rather than the first, should prevail. Economic interest and representation of a broad base of shareholders should be given priority over speed to the starting gate.

Our response to some of the Commission's specific questions is attached as an appendix to this letter.

Conclusion

Sodali strongly supports the adoption of proposed Rule 14a-11 and amendment of Rule 14a-8. The primary goal of shareholder access is to protect and facilitate the exercise of shareholders' right to nominate and elect directors. The second goal is to increase board accountability. The third goal is to promote dialogue, outreach and constructive engagement between companies and shareholders. The fourth goal is to encourage companies and boards to take the initiative in addressing governance and performance issues rather than waiting to be targeted by shareholders. We believe that from both corporate and shareholder perspectives, access will help achieve these goals and will help align the interests of companies and investors.

Respectfully submitted,

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Appendix

Questions in category A. As indicated in our letter, Sodali supports adoption of Rule 14a-11 and amendment of Rule 14a-8. A federal default access standard is needed because even though the right of shareholders to nominate and elect directors is recognized in state law, the means to exercise this right have been inadequate. Changes in corporate governance in recent years, including adoption by many companies of majority voting in director elections, have had a cumulative effect of clarifying directors' duties and responsibilities and increasing their accountability, making the shareholders' right to nominate and elect directors more important than ever before. However, governance reforms have not eliminated obstacles to shareholders' ability to nominate and elect directors of their choice. Just-vote-no campaigns, short slates or full election contests are alternatives that are not well suited to achieve the more modest goals of shareholder access.

Category B. We applaud the Commission's decision not to include trigger events and we believe that the Commission has defined reasonable standards for applicability of Rule 14a-11.

- B.8 – For the reasons explained in our comment letter to the SEC dated March 27, 2009, we support the amendment of NYSE Rule 452 and the elimination of broker discretionary voting in director elections. Rule 14a-11would increase the need for this change, as brokers would generally not be authorized to exercise discretion when shareholder-nominated candidates are on the ballot. Elimination of discretionary voting simplifies the decision-making process while increasing the need for informed beneficial owners, an efficient system of communication between companies and beneficial owners and a transparent share voting system subject to confirmation and audit.

- B.9 – The majority vote standard raises the bar for election of directors. As the standard would apply to shareholder-nominated candidates, it offers protection against abuses or trivialization of access by special interest sponsors. Cumulative voting introduces tabulation issues that should be addressed in corporate charters or by state law, not by Rule 14a-11.

- B.12 – Given the fundamental importance of the shareholder access right, reimbursement of solicitation expenses should not be an alternative or a quid pro quo for companies seeking to opt out of Rule 14a-11.

- B.13, B. 14 – As indicated in our letter, the elimination of trigger events is important to the validity of Rule 14a-11.

- B.20 – Commencement of an election contest should not cause a company to be exempt from compliance with Rule 14a-11. Rule 14a-11 should not affect the right of shareholders to engage in an election contest under Rule 14a-12(c) either before or after the mailing of proxy materials.

- B.23 – Rule 14a-11 has been structured to protect a shareholder right, not to impose a corporate governance standard or best practice on listed companies. Accordingly, stock exchange listing requirements do not seem an appropriate means to implement an access right, although they may be appropriate to establish governance best practices related to implementation of access .

Category C. The eligibility requirements for Rule 14a-11 raise questions whose implications reach far beyond shareholder access. We recommend that in connection with its review of the proxy system, the Commission should address issues relating to definition of beneficial ownership, calculation of share value over time, computation of the time shares are deemed to have been owned, the status of loaned shares, clarification of ownership rights involving derivative securities, definition of responsibilities of intermediaries in the ownership chain, analysis of the many questions that have arisen in connection with "empty voting." Many of these issues relate to the investment and voting practices of institutional investors and the responsibility with which they exercise ownership rights on behalf of clients whose assets have been entrusted to them. Careful analysis of these important and complex issues is needed to restructure the proxy system and update disclosure requirements of institutional investors in addition to resolving questions about shareholder access.

- C.24 – We agree that Rule 14a-11 should be available for use only by shareholders that are not seeking to gain control of the company. This requirement is essential to clearly define access in terms of shareholders' right to nominate and elect directors and to distinguish it from other rights available to shareholders with more aggressive agendas. Access should not be a means to wage a back-door proxy contest or effect creeping control.

Categories D through L. We generally agree with the Commission's approach that access should be designed to function at an intermediate level in the lineup of accountability mechanisms available to shareholders – more aggressive than a precatory shareholder proposal under Rule 14a-8, but less aggressive than a short slate or full election contest.

- E.1 – We support a limit on the number of shareholder director nominees. A limit is necessary to ensure that access is not used to effect a change of control.

- E.10 – We do not support the proposed "first-in" approach for the reasons set forth on page 4 of our letter.